



CHAIRMAN

Federal Communications Commission

Washington, D.C.

March 19, 2003

The Honorable John Conyers, Jr.
Ranking Member
Committee on the Judiciary
U.S. House of Representatives
B-351C Rayburn House Office Building
Washington, D.C. 20515

Dear Congressman Conyers:

Thank you for your letter of February 20, 2003, regarding the Commission's implementation of the unbundling requirements of the Telecommunications Act of 1996 (the "1996 Act"). In your correspondence, you enclosed a column entitled "Close the Divide," by Thomas W. Dortch, Jr., of the One Hundred Black Men Coalition.

On February 20, 2003, the Commission adopted new rules in its *Triennial Review* proceeding regarding the unbundled network element ("UNE") obligations of incumbent local exchange carriers ("LECs"). I am proud that the Commission made significant progress in creating a new framework that provides incentives for carriers to invest in broadband network facilities. In other areas, the course chosen on UNEs, specifically the switching and line sharing UNEs, troubles me as I believe it may lack judicial sustainability, prolong regulatory uncertainty, and have a negative impact on the industry, competition, and ultimately on the American public.

Throughout our deliberations in the *Triennial Review*, the Commission gave serious consideration to the points presented in your letter. The concerns alluded to in Mr. Dortch's column regarding the 1996 Act's goal of facilities-based competition, the unbundling of fiber loops and subloops used to transmit packet-switched services, and the availability of the UNE-Platform ("UNE-P") were at the center of the Commission's considerations and ultimate action.

In its decision, the Commission took a momentous step to promote investment in advanced architecture and fiber. I have long stated that broadband deployment is the most central communications policy objective of our day. The Commission's decision determined that there will be no unbundling requirement for fiber-to-the-home loops, nor unbundling of broadband bandwidth for loops where incumbent LECs deploy fiber further into the neighborhood but short of the customer's home (hybrid loops). Relieving incumbents from unbundling obligations for future broadband investment aligns incentives to invest with the

inherent risks and costs associated with broadband infrastructure investment. The result, in time, should be more broadband capable infrastructure to more Americans.

I could not support, though, the Commission's decision to phase out the availability of the high frequency portion of the loop (obtained through the process known as "line sharing"). Unlike many of the Commission's policies to-date, line sharing has presented clear and measurable benefits for consumers. Line sharing has given birth to facilities-based competitive broadband telecommunications carriers. Moreover, line sharing rides on the old copper infrastructure, not the new fiber facilities that we seek to advance to deployment. Thus, removal of line sharing removes the competitive pressure on incumbents to deploy more advanced networks, and I worry it could result in quickly rising retail prices for broadband consumers.

On the UNE-P front, the Commission committed itself in this proceeding to conduct a thorough review of its unbundling regime. This review took on greater importance considering two significant developments — the economic hardships facing the industry as well as the U.S. Court of Appeals for the D.C. Circuit's decision in *USTA v. FCC* to vacate, for a second time, the rules that unbundled virtually every element in the incumbents' networks. In light of that decision and its predecessor from the Supreme Court, the Commission was charged with reconstructing the list of UNEs from the ground up and justifying each element.

Unfortunately, a majority of the Commission delegated its clear statutory authority to the States with regard to the switching element for mass market customers, suggesting criteria for use by the States to determine, on a granular basis, whether economic and/or operational impairments exist that warrant unbundling local switching. In so doing, the majority gives the States a subjective and unrestricted role in determining the fate of the switching element, and therefore UNE-P. In the 1996 Act, Congress established a federal statute and federal policy to promote competition. While States can and should assist in that effort, our congressionally mandated responsibilities should not be acceded to them. As a result, I anticipate continued regulatory uncertainty and limited investment in the local competition space in connection with 51 state proceedings and countless court appeals.

In addition, by failing to adopt any meaningful limiting impairment principle, the decision seems to ignore the admonitions of both the Supreme Court and the D.C. Circuit. Equally troubling, by setting up a state review regime where an acceptable outcome is unbundled switching (and therefore UNE-P) in perpetuity, the Commission retreats from its previously stated policy of promoting facilities-based competition, the very policy propelling the broadband portion of the proceeding. Throughout my time at the Commission, I have espoused my view that facilities-based (both full and partial) competition has produced the most welfare for consumers (through lower prices and differential product offerings), provides for positive investment for our economy, creates jobs and provides us with valuable infrastructure alternatives in the face of threats to our homeland.

While this has been a tough proceeding, on the whole I am heartened by the great strides the Commission has taken forward in the digital migration and advancing broadband, and I look forward to moving to other important competition and broadband proceedings. Thank you for your interest and participation in these very important matters.

Sincerely,

A handwritten signature in black ink, appearing to read "M. Powell", with a large, stylized initial "M" and a long, sweeping underline.

Michael K. Powell

Enclosure